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No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,
Petitioners,

v.

THE STATE OF SOUTH DAKOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Dakota

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE AND MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Americans United for Separation of Church and State respectfully moves this Court for leave to file the accompanying Brief in this case as Amicus Curiae. The consent of the Attorney for the Petitioner herein has been obtained but Counsel for Respondent has refused to consent to the filing of a Brief by Americans United for Separation of Church and State as Amicus Curiae.

The applicant, Americans United for Separation of Church and State, has an interest in this case in that it is the only national interfaith organization dedicated exclusively to defending religious liberty and the constitutional principle of church-state separation. Americans United for Separation of Church and State has been involved in many of the major cases reaching this Court concerning the application of the religion clauses of the First Amendment to the United States Constitution.

The Amicus Curiae brief directs its attention to the application of the Federal Unemployment Tax Act as adopted by the State of South Dakota to church elementary and secondary schools. The Amicus brief claims that the entanglement question, which was given birth in establishment cases, is equally applicable to free exercise cases. This Amicus has consistently sought judicial aid to prevent public funding of sectarian elementary and secondary schools. Americans United for Separation of Church and State argues here that the greatest amount of independence consistent with the Least Intrusive Alternative/Compelling State Interest Test as announced in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), should be reserved for church-operated elementary and secondary schools.

Respectfully submitted,

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

Americans United is governed by a board of Trustees composed of members of many religious organizations

as well as individuals who are members of no religious body but who are concerned with the preservation of the separation of church and state. It is an organization with some 40 thousand members of various religious beliefs and of no religious belief in all states of the United States, including the State of South Dakota. Americans United is involved in litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in many of the major cases coming before this Court dealing with the First Amendment to the United States Constitution, including such cases as *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973); and *Meek* v. *Pittenger,* 421 U.S. 349 (1975).

Americans United for Separation of Church and State is particularly interested in the issues raised in this case because although this organization is firmly committed to the preservation of the principles embodied in the establishment clause of the First Amendment and has opposed public funding of church-operated elementary and secondary schools, it believes that the free exercise clause correspondingly guarantees freedom from state intrusion into church-operated school affairs. The brief of this Amicus Curiae will argue that the application of the Federal Unemployment Tax Act, as adopted by the State of South Dakota, to church elementary and secondary schools, violates the religion clauses of the First Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

If the decision of the Supreme Court of the State of South Dakota is sustained, every church operating parochial schools in that state will be subject to a judicial probing of its doctrines, teachings and government in any hearing involving the application of the state's unemployment compensation act as it relates to employees of a church working within the confines of the church-operated school. Such inquiry touches the very core of the constitutional guarantee against religious establishment. It is not only the conclusion that may be reached which may impinge upon the constitutional rights of the church, but the very process of the inquiry leading to findings and conclusions impinges upon the constitutional rights of the church.

There must be close scrutiny of the degree of entanglement existing when there is state involvement with religious institutions, but this inquiry should not merely relate to actual interference but also must concern the potential for an appearance of interference with religion.

Of great concern is the state Supreme Court's implication that the state has the right to cleave the school from the church and determine what the ministry of a church will include. Education historically has been an integral part of many a church's ministry and is entitled to the same constitutional protection as other parts of the total eccesiastical program of the church.

The free exercise clause forbids the state to inhibit the freedom of choice between public and parochial education. The state should not limit the liberty of parochial schools in the carrying out of their sacred role, and public education should be free from sectarian

pressures. The role of government in dealing with parochial school operations should be narrowly limited.

The Least Intrusive Alternative/Compelling State Interest Test announced in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), is applicable to free exercise cases involving government intrusion into church affairs. Because the statute here at issue and the administrative agency's application constitute a burden on the free exercise of religion and pose a threat of entanglement, the government must show that some compelling state interest justifies the burden imposed and in addition must demonstrate that there is no less restrictive alternative available. The state has failed to meet the requisite showing under this Test.

In balancing the interests of the state against the constitutional rights of the church, it is proper to consider the financial impact on the church and its ability to provide sectarian education if the church-operated schools are subject to the unemployment insurance requirements of the state statute. The historical role of a church in education is also an important factor which may be a part of any balancing of state and ecclesiastical interests.

The Court should be ever sensitive of the special role that sectarian education plays in the mission of many churches. For this reason, there should always be great reluctance to permit a government agency to involve itself in the educational ministry of any church.

The application of the unemployment insurance program of the State of South Dakota in a manner bringing part of the employees of church-operated schools within the ambit of the Act violates the religion

clauses of the First Amendment to the United States Constitution.

ARGUMENT

THE APPLICATION OF THE FEDERAL UNEMPLOYMENT TAX ACT AS ADOPTED BY THE STATE OF SOUTH DAKOTA TO CHURCH ELEMENTARY AND SECONDARY SCHOOLS VIOLATES THE RELIGION CLAUSES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Before us is the decision of the Supreme Court of South Dakota, which reversed the judgment of the state's circuit court and reinstated the decision of the appeals referee. Reference must be made to the appeals referee's decision to understand the full impact of this decision and its violative effect on the First Amendment. The referee made findings of fact which unquestionably bring this secondary school within the type of schools that this Court has held to be pervasively sectarian (*see* Findings of Fact, Appendix A, pp. A36-40).

The problem before the appeals referee arose out of an interpretation of the effect of a repealed subsection of the Federal Unemployment Tax Act (FUTA), which is mirrored in the South Dakota statutes adopted to conform to FUTA. Prior to the congressional amendment to FUTA in 1976, both the federal and state statute provided for exemptions from coverage under the unemployment law. The law excepted employment services performed:

1) in the employ of

   a. a church or convention of churches, or

   b. an organization which is operated primarily for religious purposes and which is operated,

supervised, controlled or principally supported by a church or convention or association of churches; or

2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

3) in the employ of a school other than a state school which is not an institution of higher education; . . . .

In 1976 Congress repealed the third exemption set forth above but left the other two statutory exemptions intact. The state contends that even though an employee is an employee of a church organization he is not an exempt employee if he happens to teach in a school operated by the church.

The appeals referee in this case determined, and the state Supreme Court by its reinstating decision also ruled, that all of the pastors of the St. Martin Evangelical Lutheran Church who perform services in the academy, as well as all male teachers, were exempt from coverage, but female teachers were not exempt. This apparent illogical result came about as a result of the twisted logic of the referee and Court majority. The referee, in reviewing the church doctrines, teachings and polity, concluded that the male teachers had "equal status" (with pastors) in the church in many respects, including receipt of a divine, life-long call, authorization to vote on Synod matters, and ability to perform the sacerdotal functions of the church (Appendix C, p. A44.

The appeals referee, however, discarded the protestations of the church and held that the female teachers

were not exempt like their brother teachers. The referee reasoned that the phrase "ordained, commissioned or licensed" is interpreted to mean "being vested with ministerial status in accordance with the procedure followed by the particular church denomination." He ruled: "The female teachers do not have this status as the Scriptural position of the Synod prevents them from voting on Synod matters, which pastors and male teachers can do, and from performing the sacerdotal functions of the Church." (Appendix C, p. A44).

Apparently it was not important to the appeals referee that he had specifically found that "The Synod also has female teachers whom they consider part of the ministry. The female teachers have responsibilities equal to that of male teachers, receive identical training, and also receive a divine, life-long call. . . ." (Findings of Fact No. XI, Appendix C, p. A38).

Under the method used by the appeals referee, a church would be subject to a judicial probing of its doctrines, teachings and government. This type of inquiry touches the very core of the constitutional guarantee against religious establishment. *State of New York* v. *Cathedral Academy,* 434 U.S. 125 (1977).

The dissenting opinion of the state Supreme Court also pinpoints a problem pregnant with serious entanglement potential. (Appendix A, pp. A22 & 23). A church-operated school would face the prospect of proving that an employee was discharged because of a violation of church doctrine instead of a budgetary layoff. Such a hearing would involve the question of whether the teacher did or did not teach contrary to Synod doctrine or on what basis, according to doctrinal standards, the employee's actions constituted miscon-

duct. One cannot even imagine the scope of such an inquiry, but the hearing officer might well be required to decide what the teachings of the church are and whether the church administrators follow their own teachings. Inquiry might veer even into the impossible area of how central to the beliefs of the church a policy provision is and whether the church policy is a religious teaching or only administrative fiat. This is exactly the kind of excessive entanglement the courts have been reluctant to countenance.

When the state must make inquiry as to whether an employee was terminated for misconduct or for other reasons, it is not only the conclusion that may be reached which may impinge upon the constitutional rights of the church, but the very process of the inquiry leading to findings and conclusions. *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 1320 (1979).

This Court has declared that it will "not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664 (1970). In *Walz,* this Court recognized the importance of charting a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any resemblance of established religion." It emphasized the necessity of clearly examining governmental actions to see if the government thereby becomes excessively involved in the affairs of the church. *Id.* at 672.

In a footnote to its opinion in *Roemer* v. *Maryland Public Works Board,* 426 U.S. 736, 748, n.15 (1976),

this Court refers to *Walz* in a way relevant to the present inquiry:

> The importance of avoiding persistent and potentially frictional contact between governmental and religious authorities is such that it has been held to justify the *extension,* rather than the withholding of certain benefits to religious organizations. The Court upheld the exemption of such organizations from property taxation partly on this ground.

Thus, this Court has recognized that potentially frictional contact can best be avoided by exempting churches from taxation.

In *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1971), this Court called for the close scrutiny of the degree of entanglement when there is state involvement with religious institutions. Specifically, it stated that the "objective is to prevent, as far as possible, the intrusion of either into the precincts of the other."

In *Allen* v. *Morton,* 459 F.2d 65 (D.C. Cir. 1973), the court suggested that government involvement with religion should be kept to a minimum and that not only actual interference, but the "potential for and appearance of interference with religion," should be avoided. *Id.* at 75.

It has long been recognized that the First Amendment needs breathing space and that statutes which burden the exercise of First Amendment rights must be carefully drawn. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). The statute in question, as interpreted by the State of South Dakota, fails to avoid excessive entanglement between church and state.

In this case we have a subtle type of governmental intrusion, which is perhaps the most pernicious of all. As pointed out in the dissenting opinion of the state Supreme Court, "Appellants are attempting to cleave the school from the church." (Appendix A, p. A21).

Today one of the great concerns sweeping ecclesiastical circles is the attempt of government to define the mission of the church. To determine what in the judgment of a bureaucrat is religious and what is secular, to determine what lies within the ministry of the church, the state so often has attempted, by definition, to delete from ecclesiastical concern functions which have been historically a function of the church. *See Espinosa* v. *Rusk,* —— F.2d ——, 49 U.S.L.W. 2311 (10th Cir. Oct. 21, 1980).

One California Supreme Court Justice, in a dissenting opinion, astutely observed that freedom of "religious thought and action cannot be whittled away by carving out segments of religious activities and relegating them to the realm of secular affairs. If that were permitted, the right or action for a religious purpose could eventually be destroyed by the gradual severance and classification as secular of every activity undertaken to promote religious purpose." *Gospel Army* v. *City of Los Angeles,* 163 P.2d 704, 719 (1945).

Education historically has been an important and integral part of religious ministry and is an integral part of the Judeo-Christian religious tradition. A canon attributed to the Sixth Ecumenical Council of Constantinople in 680-81 A.D. requires priests to maintain schools for children. J. Bingham, *The Antiquities of the Christian Church,* book 8, ch. 7, § 12 (1856). In this country several denominations spend

large portions of their church funds for the educational ministry of the church, providing a sectarian education to its young. As this Court noted in *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975), "The very purpose of many [sectarian] schools is to provide an integrated secular and religious education; the teaching process, is, to a large extent, devoted to the inculcation of religious values and beliefs."

If a church-operated school is an integral aspect of the church ministry, it is entitled to the same constitutional protection as other parts of the ecclesiastical program of the church. It has been suggested that the free exercise clause forbids the state to inhibit the freedom of choice between public and parochial education, either by restricting the liberty of private schools through governmental action or jeopardizing the freedom of public schools from sectarian pressures. *School District of Abington* v. *Schempp*, 374 U.S. 203, 242 (1963) (Brennan, J., concurring opinion).

If we accept this concept that the state should not limit the liberty of parochial schools in the carrying out of their role of inculcating religious values, and public education is to be free from sectarian pressures, then the role of government over parochial schools should be narrowly limited.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court introduced the Least Intrusive Alternative/ Compelling State Interest Test for application in cases where free exercise rights come in conflict with state concerns. In *Sherbert* this Court made clear that every governmental interest would not overbalance a free exercise claim. The interest must be shown to involve a grave and paramount state concern. *Id.* at 405. Under

this balancing test, the burden is upon the state to establish: 1) that there is a compelling governmental interest involving a paramount state interest and 2) the absence of any less intrusive means whereby the state may carry out any such vital state objective.

Although this Court's concern about "excessive entanglement" originated in establishment cases [*Lemon* v. *Kurtzman, supra; Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973); *Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Meek* v. *Pittenger, supra; Wolman* v. *Walter,* 433 U.S. 229 (1977)], it should be equally applicable to free exercise cases because it goes to the core of the principle deductible from the religion clause decisions that the Court "will not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission of City of New York, supra* at 669.

Because the statute here at issue and the administrative agency's action herein complained of are both burdens on the free exercise of religion and pose a threat of excessive entanglement, the government must show that some compelling state interest justifies the burden imposed and in addition must demonstrate that there exists no less restrictive or entangling alternative. *Surinach* v. *Pesquera de Busquets,* 304 F.2d 73, 79 (1st Cir. 1979).

The majority opinion of the state Supreme Court in the instant case attempts to address this issue, stating that:

> Further, coverage of parochial school employees under the unemployment compensation law is permissible because it is justified by a compelling governmental interest. This interest is to provide a system of income maintenance for unemployed

> individuals so that they have the resources for food, shelter, and other necessities of life until they are able to secure other employment.

(Appendix A, p. A11). This comment, however, misses the mark. The state cannot meet the burden imposed by *Sherbert* by simply asserting the existence of some generally recognized interest which the state has over the subject matter. As Professor Lawrence Tribe has stated:

> In applying the least intrusive alternative-compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying an exemption with the state's usually much greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest—that in denying an exemption—is constitutionally relevant when an exemption is sought.

Tribe, *American Constitutional Law* 855 (1978).

The state has failed to meet the requisite showing. In fact, by its own interpretation of the existing statute, a substantial number of the teachers are, in fact, exempted from coverage, i.e. the pastors and all male teachers. This exemption, presumably, is without major impact on the state's legitimate concerns for its unemployment compensation insurance program.

As has been referred to previously, sectarian education historically has been recognized as a legitimate church ministry. History and tradition may be important factors in any balancing of state and ecclesiastical interest. *Wisconsin* v. *Yoder,* 406 U.S. 205, 209-13, 225-27 (1972).

In *NLRB* v. *Catholic Bishop of Chicago, supra,* this Court indicated that an administrative agency

may not engage in activities which tend to jeopardize the religious freedoms of an organization unless the agency's conduct is authorized by a clear expression of an affirmative congressional intent. The fact there is no such clear expression is one additional weight that may be placed upon the scale which balances the interests of the state against the First Amendment protection for ecclesiastical concerns.

If parents are morally and constitutionally free to choose the environment of their child's educational process, and the public schools are to be insulated at least to a large extent from sectarian pressures, there should be the widest latitude possible granted to the parochial school and its operation and control. The greatest amount of independence consistent with the Least Intrusive Alternative/Compelling State Interest Test should be reserved for church-operated schools. Freedom of religion may be restricted only to prevent grave and immediate danger to interests which the state may lawfully protect. *Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943). The courts have long recognized the validity of application of health and safety regulations to parochial schools. However, further impact by the state on institutions that are basically ecclesiastical in nature should be permitted after passing only the closest of judicial scrutiny. This Court in *NLRB* v. *Catholic Bishop of Chicago, supra,* referring to Mr. Justice Douglas' comment in *Lemon,* noted "the admitted and obvious fact that the *raison d'être* of parochial schools is the propagation of a religious faith."

The sensitive treatment which this Court has always given when considering even only the potential of state surveillance and intrusion into church-operated ele-

mentary schools should be an additional factor in the balancing process.

An even-handed approach to the First Amendment would seem to suggest that the religion clauses, serving as they do as a buckler to prevent financial aid to sectarian schools, should not be any less effective to ward off the inhibiting effect of governmental controls and demands. *Catholic Bishop* v. *NLRB,* 559 F.2d 1112, 1131 (7th Cir. 1977).

The required unemployment insurance coverage of church-operated schools can have a devastating financial impact on the church and its ability to provide sectarian education. While some schools are probably capable of surviving the new tax, it is conceivable that other schools may be forced out of operation. Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercises Issues,* 25 Vill. L. Rev. 69, 110-114 (1979-80).

The religion clauses envisoned broad objectives premised upon a general colonial fear of sovereign intrusion into religious areas. This Court expressed this concern for the zealous protection of religious liberty when it suggested that the First Amendment "radiates . . . a spirit of freedom for religious organizations, and independent from secular control or manipulation." *Kederoff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952).

No governmental agency should, except upon an adequate showing of a compelling state interest and the absence of any less intrusive and entangling alternative, ever involve itself in the educational ministry of

the church when state interests conflict with the free exercise rights of the church-operated school.

As James Madison said, "It is proper to take alarm at the first experiment on our liberties." Recently this Court, in *Lemon* v. *Kurtzman, supra* at 624-25, reiterated the vital importance of arresting even the slightest breach of the First Amendment's guarantees:

> [M]odern governmental programs have self-perpetuating and self-expanding propensities . . . . [W]e cannot fail to see that in constitutional adjudication some steps which when taken were thought to approach 'the verge' have become the platform for yet further steps. A certain momentum develops in constitutional theory, and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. . . . The dangers are increased by difficulty of perceiving in advance exactly where the 'verge' of the precipice lies. . . . [I]nvolvement or entanglement between government and religion serves as a warning signal.

CONCLUSION

For the reasons set forth herein, the judgment of the Supreme Court of the State of South Dakota results in a violation of the religion clauses of the First Amendment to the United States Constitution and therefore must be reversed.

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